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UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF CALIFORNIA

<p>Bona Fide Conglomerate, Inc.,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>SourceAmerica, PRIDE Industries, Inc.,        Kent, Campa &amp; Kate, Inc.,        ServiceSource, Inc., Job Options, Inc.,        Goodwill Industries of Southern        California, Lakeview Center, Inc., The        Ginn Group, Inc., Corporate Source,        Inc., CW Resources, National Council        of Source America Employers,        Opportunity Village, Inc.,</p> <p style="text-align: center;">Defendants.</p>	<p>) Case No.: 3:14-cv-00751-GPC-AGS</p> <p>)</p> <p>) <i>Assigned to: Judge Gonzalo P. Curiel</i></p> <p>) <i>Magistrate Judge: Andrew G. Schopler</i></p> <p>)</p> <p>) <b>DEFENDANT/COUNTER-</b></p> <p>) <b>CLAIMANT SOURCEAMERICA'S</b></p> <p>) <b>OPPOSITION TO</b></p> <p>) <b>PLAINTIFF/COUNTER-</b></p> <p>) <b>DEFENDANT BONA FIDE</b></p> <p>) <b>CONGLOMERATE, INC.'S</b></p> <p>) <b>CONSOLIDATED MOTION TO</b></p> <p>) <b>COMPEL</b></p> <p>) [Filed and served concurrently with</p> <p>) Declaration of Matthew P. Nugent,</p> <p>) Declaration of Joseph W. Goodman,</p> <p>) and Declaration of Emily Skrdla]</p> <p>) <b>Date: April 17, 2017</b></p> <p>) <b>Time: 1:00 p.m.</b></p> <p>) <b>Courtroom: 5C</b></p>
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<p>SourceAmerica,</p> <p style="text-align: center;">Counterclaimant,</p> <p style="text-align: center;">v.</p> <p>Bona Fide Conglomerate, Inc. and        Ruben Lopez,</p> <p style="text-align: center;">Counterdefendants.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>
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**I. INTRODUCTION AND SUMMARY OF ARGUMENT**

In abject violation of this Court's Local Civil Rule 26.1(a), which requires (in-person) meet and confer efforts before the filing of any motion to compel where, as here, the parties are represented by counsel in the same county, Plaintiff/Counterdefendant Bona Fide Conglomerate, Inc. ("Bona Fide" or Plaintiff) has filed a frivolous motion to compel in which it does not even attempt to establish its compliance with that requirement. Moreover, Bona Fide repeatedly misrepresents agreements between the parties and omits numerous material facts, improperly seeks reconsideration of a prior order of this Court, and filed its motion with less than the 28 days' notice required by Local Civil Rule 7.1(e), without seeking an order shortening time. The motion should be denied in its entirety.

Counsel for SourceAmerica and Bona Fide's counsel, Andrew Schouten, whose offices are in San Diego County only blocks apart, have met in person on three separate occasions in 2017 pursuant to Local Civil Rule 26.1(a) to discuss numerous discovery issues. But never, during more than six hours of meetings, did Mr. Schouten ever raise with SourceAmerica's counsel any issue with respect to SourceAmerica's responses to Bona Fide's Interrogatories (Set One) or Requests for Production (Set One). Conspicuously, Mr. Schouten's declaration in support of the motion does not claim otherwise. Rather, Bona Fide attempts to support its motion with a declaration from its former counsel, Jared Reams, a lawyer whose firm, Eckland & Blando LLP, was disqualified by Judge Curiel in August 2016 from further participation in this case due to ethical violations, including improperly retaining, reviewing, disseminating, and misrepresenting facts with respect to its possession of SourceAmerica's privileged information. The Reams declaration, which purports to recount an alleged agreement reached during a phone call that occurred more than one year ago, is incorrect. SourceAmerica never agreed to serve supplemental discovery responses within two weeks of entry of an order on the then-pending motion to disqualify, alone. Rather, SourceAmerica's service of

1 supplemental responses and its document production were always contingent on both  
2 a ruling on that motion *and* entry by this Court of a protective order, particularly  
3 given Bona Fide's former counsel's bad faith conduct that led to his and his firm's  
4 disqualification. As Bona Fide ignores, the very motion at issue was not merely a  
5 motion to disqualify, but also a motion for protective order. Tellingly, the Reams  
6 declaration is unsupported by any contemporaneous correspondence, and instead is  
7 contradicted by SourceAmerica's counsel's confirming correspondence drafted  
8 following that call. (Nugent Decl. ¶6, Ex. A.)

9 Bona Fide's failure to meet and confer with SourceAmerica before filing the  
10 instant motion is even more inexcusable because the motion ignores and directly  
11 contradicts the agreement between the parties that *did exist*, which specified that each  
12 party would simultaneously produce its responsive documents following the Court's  
13 entry of a protective order. In reliance on that agreement, to date, Bona Fide itself  
14 has not produced a single document in response to SourceAmerica's document  
15 requests, despite having agreed to do so in response to multiple requests for  
16 production and interrogatories, nor has it provided a privilege log despite asserting  
17 privilege objections in response to many of SourceAmerica's requests for production  
18 of documents. In reliance on that agreement, SourceAmerica has not (yet) filed a  
19 motion to compel document production by Bona Fide, despite Bona Fide's bad faith  
20 conduct including falsely stating in discovery responses that it already produced  
21 responsive key documents when it has not produced any documents in discovery at  
22 all.

23 Having relied upon and benefitted from the parties' agreement to delay  
24 document production until after entry of a protective order, Bona Fide is estopped  
25 from falsely denying its existence in its motion to compel. Bona Fide's failure to  
26 inform the Court of that agreement – which gives lie to the alleged basis for its  
27 motion to compel – is further grounds for denial of the motion. Bona Fide also  
28

untimely filed its motion to compel in violation of Local Civil Rule 7.1(e)(1) with less than the required 28 days' notice to SourceAmerica.

Even assuming *arguendo* that Bona Fide's motion was properly before this Court, Bona Fide has not met its burden to show the discovery requests at issue in its motion are relevant. With respect to Interrogatories (Set One) and Requests for Production (Set One), Bona Fide inaccurately portrays the requests in a cursory manner that fails to establish that the requests seek relevant information. Bona Fide then makes contradictory claims regarding SourceAmerica's objections. For example, Bona Fide simultaneously claims that SourceAmerica failed to show documents are confidential while admitting the documents are confidential and even arguing they are confidential in its recently filed Motion for Protective Order.

With respect to Interrogatories (Set Two) and Requests for Production (Set Three), Magistrate Judge Bartick's order [Dkt. 331] precludes any need for further response. In the Court's order, Judge Bartick questioned the requests' relevance and concluded that SourceAmerica has already provided sufficient information in response to the requests. Bona Fide has improperly disguised as a motion to compel what is actually a procedurally improper motion for reconsideration. Such a motion for reconsideration should be denied, because when the case was transferred from Judge Bartick to Judge Schopler, the Court specifically stated that "the reassignment of cases to Judge Schopler is not to be viewed as an opportunity to seek reconsideration of previous adverse rulings." [Dkt. 354].

In light of the foregoing, Bona Fide's motion to compel was unnecessary and/or at least, premature. The Court should deny Bona Fide's motion to compel, and should award SourceAmerica its reasonable attorney's fees incurred in connection with its Opposition to the motion.

## **II. FACTUAL BACKGROUND**

SourceAmerica is a designated Central Non-Profit Agency ("CNA") for the United States AbilityOne Program, which was created to increase employment

opportunities for persons who are blind or have severe disabilities. Javits-Wagner-O'Day ("JWOD") Act, 41 U.S.C. § 8501, *et seq.* As a CNA, the federal Government designated SourceAmerica with authority to, among other things, facilitate federal procurement of products and services from NPAs participating in the AbilityOne Program that employ persons with severe disabilities, by recommending suitable opportunities for such employment, and recommending to the AbilityOne Commission (the "Commission") the NPAs best suited to perform those opportunities.<sup>1</sup> 41 C.F.R. § 51-3.2; *Nat'l. Telecommuting Inst., Inc. v. SourceAmerica*, No. 15-293C, 2015 U.S. Claims LEXIS 1406, \*3-4 (Fed. Cl. Oct. 14, 2015). As a CNA, SourceAmerica has the responsibility, among other things, to "evaluate the qualifications and capabilities of its nonprofit agencies and provide the Committee with pertinent data concerning its nonprofit agencies, their status as qualified nonprofit agencies, their manufacturing or service capabilities, and other information concerning them required by the Commission." 41 CFR 51-3.2(b).

SourceAmerica largely fulfills the responsibility of evaluating the qualifications and capabilities of its nonprofit agencies through its NPA Recommendation Process when recommending suitable commodities or services to the Commission for procurement from SourceAmerica's nonprofit agencies. 41 C.F.R. 51-2.4; *see also* Dkt. 358-5, ¶5. Under the NPA Recommendation Process, SourceAmerica publishes Opportunity Notices to the NPAs for consideration and response. [Dkt. 358-5, ¶6.] The Opportunity Notice is similar to a Request for Proposal (RFP) and includes a description of the requirement, the estimated dollar value, and any special requirements or preferences of the Federal contracting agency

<sup>1</sup>Only the Commission, not SourceAmerica, can select an NPA for an opportunity. 41 U.S.C. § 8503(c) ("Central nonprofit agency or agencies. The Committee shall designate a central nonprofit agency or agencies to facilitate the distribution, by direct allocation, subcontract, or any other means, of orders of the Federal Government for products and services on the procurement list among qualified nonprofit agencies for the blind or qualified nonprofit agencies for other severely disabled."); *see also* 48 C.F.R. § 8.701 ("Central nonprofit agency means . . . [SourceAmerica], which has been designated to represent AbilityOne participating nonprofit agencies serving people with severe disabilities other than blindness.").

1 that will award the contract. *Id.* In this capacity, SourceAmerica's primary role is to:  
 2 1) evaluate NPAs' responses to Opportunity Notices and assess the NPAs' suitability  
 3 and capability to perform the defined scope of work; and 2) recommend to the  
 4 Commission the NPA best suited for the opportunity based on the criteria set forth in  
 5 the Opportunity Notice and in the best interest of the AbilityOne Program. *Id.*  
 6 SourceAmerica's administrative record is comprised of the following eight categories  
 7 of documents: 1) Posting Request and Engagement Documentation; 2) Posting  
 8 Planning and Drafting Documentation; 3) Opportunity Notice and supplemental  
 9 documents; 4) Inquiry Response Documentation; 5) Evaluation Documentation; 6)  
 10 Recommendation Documentation; 7) Debrief Documentation (as applicable); and 8)  
 11 Appeal Documentation (as applicable). [Dkt. 358-5, ¶7.]

12 **A. Federal Law Requires SourceAmerica to Protect the Confidential**  
 13 **Information Contained in its Administrative Record**

14 Bona Fide's and Lopez's discovery requests in this matter seek, without  
 15 limitation, SourceAmerica's entire administrative record for each of the AbilityOne  
 16 Program opportunities at issue in the amended and supplemental complaints. The  
 17 administrative record is replete with "source selection information" that  
 18 SourceAmerica is prohibited by law from disclosing, in accordance with 41 U.S.C. §  
 19 2102 (a)(3)(A)(ii) & (B); FAR 3.104-4; FAR 15.207(b), *et seq.* [Dkt. 358-5, ¶7.]  
 20 Accordingly, SourceAmerica protects the proprietary and confidential information of  
 21 NPAs, including "source selection information," with a high level of confidentiality,  
 22 and it is not permitted to produce any documents or information that is part of the  
 23 administrative record without the entry of a protective order first. [*Id.* at ¶10.]

24 **B. Former Counsel for Bona Fide was Disqualified for Illegal and/or**  
 25 **Bad Faith Conduct**

26 In or around 2012, Bona Fide's CEO, Counterdefendant Ruben Lopez  
 27 ("Lopez") embarked on a coordinated attack on SourceAmerica, presumably because  
 28 SourceAmerica refused to bypass its recommendation procedures and recommend

1 Bona Fide to the Commission for certain opportunities for which other NPAs were  
2 better suited.<sup>2</sup> By or before May of 2013, Lopez began conspiring with a disgruntled  
3 SourceAmerica employee, then General Counsel and Chief Compliance Officer Jean  
4 Robinson (“Robinson”).<sup>3</sup> Lopez has admitted in sworn declarations to recording his  
5 conversations with Robinson throughout 2013 and 2014 on more than 20 occasions.  
6 [Dkt. 259; 340.] Those recordings, made without Robinson’s knowledge or consent,  
7 contained privileged information belonging to SourceAmerica. [Dkt. 336.]

8 SourceAmerica first became aware of these recordings when Bona Fide  
9 quoted them in its Amended Complaint. [Dkt. 128.] SourceAmerica made  
10 numerous requests for the return of all its privileged information in Bona Fide’s  
11 possession, only to be ignored and/or told falsely by Bona Fide’s lead counsel,  
12 Daniel Cragg (“Cragg”), that Bona Fide had no such privileged information. [Dkt.  
13 251.] On November 30, 2015, SourceAmerica filed a motion to disqualify Cragg and  
14 his law firm, Eckland & Blando LLP, because of the foregoing unethical conduct.  
15 [Dkt. 251.] The motion to disqualify also included a motion for protective order. On  
16 August 16, 2016, Judge Curiel entered an Order granting the motion to disqualify.  
17 [Dkt. 336.] The Court found that the Robinson Tapes contained privileged  
18 information, that Robinson had no authority to waive the attorney-client privilege,  
19 and that SourceAmerica had not waived the privilege. [*Id.*] It further concluded that  
20 Cragg violated his ethical duties in his handling of the Robinson Tapes by retaining  
21 possession of them and failing to seek Court guidance once he knew SourceAmerica

22  
23 <sup>2</sup>For example, in May 2012, Lopez threatened SourceAmerica that: “You don’t  
understand what’s coming if I don’t get this project.” [SourceAmerica’s Amended  
Counterclaims, Dkt.308, p. 9:12-17.]

24 <sup>3</sup>On the recordings, Robinson admits that she was angry with SourceAmerica because  
25 she did not get along with certain employees, received negative performance reviews  
or criticism, and was ultimately terminated. *See* Dkt. 251, Ex. 3, Declaration of Dennis  
26 Fields in Support of Defendant SourceAmerica’s *Ex Parte* Motion for Order  
Shortening Time (“Fields Decl.”) ¶11, Ex. F. Throughout Robinson’s tenure at  
27 SourceAmerica, she was prohibited from disclosing SourceAmerica’s privileged and  
confidential information by a non-disclosure agreement and applicable ethics rules.  
28 Fields Decl. ¶¶9-10. Robinson was aware of these obligations, and that she was not  
authorized to waive the privilege. [Dkt. 251, Ex.3, ¶11].

1 contended they contained privileged information and demanded their return. [*Id.*]  
 2 The Court further found that Bona Fide might use privileged information from the  
 3 Robinson Tapes against SourceAmerica in the future. [*Id.*] Thus, the Court  
 4 concluded that disqualification of Cragg and his firm was “necessary to maintain the  
 5 integrity of the judicial process.” [Dkt. 336 at 24:8.]

6 The Court did not, however, enter a protective order. Instead, the Court denied  
 7 that portion of SourceAmerica’s motion to disqualify, without prejudice, to enable the  
 8 parties to agree on a protective order or to allow SourceAmerica to file a new motion  
 9 with the Court seeking a protective order. After failing to come to a resolution,  
 10 despite several months of meeting and conferring with opposing counsel,  
 11 SourceAmerica filed a motion requesting a protective order. [Dkt. 358-1.]

12 **C. Despite the Parties’ Agreement to Supplement Responses**  
 13 **Following Entry of a Protective Order, Bona Fide Filed this**  
 14 **Motion to Compel**

15 SourceAmerica served timely responses to Bona Fide’s discovery requests  
 16 while its motion to disqualify and request for a protective order was pending with this  
 17 Court. (Declaration of Matthew P. Nugent in Support of Defendant /Counterclaimant  
 18 SourceAmerica’s Opposition to Bona Fide’s Motion to Compel (“Nugent Decl.”))  
 19 ¶3.) However, SourceAmerica had no choice but to respond to the discovery  
 20 requests by providing only objections. As previously explained, Federal law requires  
 21 SourceAmerica not to produce its administrative record, which contains confidential  
 22 and sensitive information, absent the entry of an appropriate protective order.  
 23 (Nugent ¶4) Further, SourceAmerica had good reason to believe that Bona Fide, or  
 24 its counsel, disseminated SourceAmerica’s privileged and confidential information.  
 25 Due to Bona Fide’s or its counsel’s bad faith conduct, SourceAmerica could not  
 26 provide more than just objections in its responses, without first taking measures to  
 27 protect its privileged and confidential material from further disclosure. Such  
 28 responses were provided with the express understanding that they would be  
 supplemented upon entry of a protective order. (Nugent Decl. ¶¶4-7, 11, 14, 16, 18.)

1 After SourceAmerica provided responses on November 30, 2015,  
 2 SourceAmerica wrote to Bona Fide explaining that SourceAmerica could not  
 3 disclose protected information and documents that contain confidential, proprietary,  
 4 and/or trade secret information until a protective order was entered. (Nugent Decl.  
 5 ¶4.) On both December 10, 2015 and March 4, 2016, counsel for SourceAmerica  
 6 agreed during telephone conversations with Jared Reams to provide responsive  
 7 information and documents after the entry of a protective order. (*Id.* at ¶¶5-7.)  
 8 SourceAmerica reaffirmed this agreement on October 11, 2016 during a telephone  
 9 conversation with Bona Fide’s current counsel, Andrew Schouten. (*Id.* at ¶11.) Mr.  
 10 Schouten did not raise any objection to that agreement and clearly indicated that he  
 11 concurred SourceAmerica would not be required to serve supplemental responses to  
 12 Bona Fide’s Interrogatories (Set One) and Requests for Production of Documents  
 13 (Set One) or produce documents until after entry of a protective order. (*Id.*)

14 On November 3, 2016, counsel for SourceAmerica contacted Mr. Schouten  
 15 with respect to his delay in reviewing a proposed protective order, and reminded him  
 16 that SourceAmerica needed an agreement on its draft protective order “*soon, since*  
 17 *SourceAmerica cannot proceed with discovery supplementation or document*  
 18 *production until a protective order is in place.*” (*Id.* at ¶12-13, Ex. B (emphasis  
 19 added).) The same day, Mr. Schouten responded that comments would be provided  
 20 by the next day (though they were not). (*Id.* at ¶14, Ex. C.) Mr. Schouten did not  
 21 express any lack of understanding or disagreement that SourceAmerica’s discovery  
 22 supplementation and document production could not occur until the Court entered a  
 23 protective order. (*Id.*) Further, during an in-person meeting on February 8, 2017,  
 24 Mr. Schouten expressly reaffirmed that both parties would mutually produce  
 25 documents following the entry of a protective order. (*Id.* at ¶18.) Nevertheless, Bona  
 26 Fide brought this motion despite knowing that the Court has not even heard oral

27  
 28

arguments on the pending motions for a protective order.<sup>4</sup>

### III. ARGUMENT

#### A. **Plaintiff's Motion to Compel is Procedurally Invalid and Should Be Denied**

Plaintiff's motion is procedurally invalid in multiple ways. First, Plaintiff failed to meet and confer prior to filing this motion to compel. Second, Plaintiff failed to inform the Court of the parties' longstanding agreement to provide further discovery responses and to engage in simultaneous document production following the Court's entry of a protective order. By filing this motion to compel, despite knowing that SourceAmerica had already agreed to produce the documents and information sought upon the entry of a protective order, Plaintiff utterly fails to comply with Local Rule 26.1. Third, Plaintiff's motion is untimely in violation of Local Civil Rule 7.1(e)(1) with less than the required 28 days' notice to SourceAmerica.

##### 1. *Plaintiff Failed to Meet and Confer as to Interrogatories, (Set One) and Requests for Production (Set One)*

Parties are required to meet and confer prior to filing motions to compel to narrow the issues brought before the Court to specific genuine issues that cannot be resolved without judicial intervention. Fed. R. Civ. P. 37(a)(1). A "failure to meet and confer is grounds for denial of the motion to compel." *Heilman v. Silva*, No. 13CV2984-JLS-MDD, 2015 WL 1632693, at \*2 (S.D. Cal. Apr. 13, 2015) (denying a motion to compel based on Plaintiff's failure to meet and confer with Defendant in good faith). Civil Local Rule 26.1 (a) requires parties to meet and confer in good faith and in person, provided that the parties are in the same county.

As to SourceAmerica's responses to Bona Fide's Interrogatories, Set One, and Requests for Production, Set One, the only meet and confer effort that

<sup>4</sup> In light of the filing of this motion to compel, SourceAmerica intends to serve redacted supplemental responses to Bona Fide's Interrogatories (Set One) and Requests for Production of Document (Set One), and will then supplement further with unredacted responses after entry of a protective order.

Plaintiff's motion identifies are two phone calls occurring on December 10, 2015 and March 4, 2016, more than a year ago, with disqualified former counsel. [Dkt. 378-1, 2-3.] Even more troubling, Plaintiff's motion and Jared Reams' declaration misrepresent the parties' communications. Plaintiff's motion and Mr. Reams' declaration state that counsel for SourceAmerica agreed to produce further responses within one to two weeks of the Court's order on the motion to disqualify. (*Id.* at 3:9-10; *see also* Reams Decl. p. 1, lns. 26-27.) However, this agreement never existed. As the confirming letter sent after the March 4, 2016 telephone call shows, the agreement was to extend the deadline *to file a motion to compel* until two weeks after the Court's order on the motion to disqualify, not to serve supplemental discovery responses. (Nugent Decl. ¶6, Ex. A.) Moreover, the parties also agreed to engage in further meet and confer efforts before filing any motions to compel. (*Id.* at ¶8.) Therefore, Bona Fide fails to carry its burden to show that it met and conferred in good faith prior to filing the present motion.

Since those two phone calls over a year ago, the parties have not engaged in any further substantive discussion of SourceAmerica's responses to Interrogatories (Set One) and Requests for Production (Set One). (Nugent Decl. ¶20.) Pursuant to Civil Local Rule 26.1 (a), SourceAmerica participated in three in-person discovery meet-and-confer conferences with Plaintiff in 2017 alone, for approximately six hours or more. (Nugent Decl. ¶¶ 17-18; Declaration of Emily S. Skrdla in Support of Defendant /Counterclaimant SourceAmerica's Opposition to Bona Fide's Motion to Compel ("Skrdla Decl.") ¶¶ 2-3; Declaration of Joseph W. Goodman in Support of Defendant /Counterclaimant SourceAmerica's Opposition to Bona Fide's Motion to Compel ("Goodman Decl.") ¶6.) Plaintiff's counsel did not raise any issue with respect to SourceAmerica's responses to Bona Fide's Interrogatories, Set One, or Requests for Production, Set One, *even a single time*. (Nugent Decl., ¶20; Skrdla Decl., ¶5; Goodman Decl., ¶8.)

It is well-established that the Court may deny a motion to compel outright,

pursuant to Local Rule 26.1 and Federal Rule of Civil Procedure 37(a)(1), when the movant failed to meet and confer in good faith. *See Rogers v. Giurbino*, 288 F.R.D. 469, 477 (S.D. Cal. 2012) (noting “[a] court can deny a motion to compel solely because of a party’s failure to meet and confer prior to filing the motion”); *Shaw v. County of San Diego*, No. 06-CV-2680-IEG (POR), 2008 U.S. Dist. LEXIS 80508 at \*3-4 (S.D. Cal. Oct. 9, 2008) (denying motion to compel based upon a failure to meet and confer); *Heilman v. Silva*, No. 13cv2984-JLS-MDD, 2015 U.S. Dist. LEXIS 48353 (S.D. Cal. Apr. 13, 2015) (denying motion to compel based upon a failure to meet and confer in good faith). Plaintiff has had ample opportunity to discuss the discovery issues presented in this motion with SourceAmerica, which could have been resolved without the Court’s intervention.

Plaintiff’s reliance on only two telephone calls, from 2015 and early 2016, does not present sufficient evidence to show Plaintiff met its burden to meet and confer prior to filing its motion to compel. Further, Plaintiff never made any effort to raise any issue with respect to SourceAmerica’s responses to Bona Fide’s Interrogatories, Set One, or Requests for Production, Set One, despite meeting in-person with SourceAmerica on three separate occasions in 2017. Because Plaintiff has failed to meet and confer in good faith, this Court must deny Plaintiff’s motion.

2. *Because the Parties Agreed to Simultaneously Produce Documents Following the Court’s Entry of a Protective Order Bona Fide’s Motion to Compel is Premature and Must be Denied*

Even if the Court accepts Plaintiff’s deficient meet and confer efforts as to its Interrogatories, Set One, and Requests for Production, Set One, the motion is unnecessary and premature as to every discovery response it seeks. As previously explained, the parties had a longstanding agreement to provide further discovery responses and to engage in simultaneous document production after the Court entered a protective order. Following the Court’s order disqualifying Bona Fide’s counsel, SourceAmerica met and conferred with Bona Fide to agree on a protective order.

1 SourceAmerica's original meet and confer letter on December 4, 2015  
 2 explained to Bona Fide that it sought a protective order permitting SourceAmerica to  
 3 produce documents on an attorneys' eyes only basis.<sup>5</sup> Plaintiff's motion now seeks  
 4 unnecessary judicial intervention. Plaintiff agreed that SourceAmerica would  
 5 produce documents and supplement discovery only after the entry of a protective  
 6 order. (Nugent Decl. ¶¶5-7, 11, 13, 15-16, 18, & Exs. A, B, C, D, E.; Skrdla Decl.  
 7 ¶3) This agreement would have allowed SourceAmerica to supplement its responses  
 8 with complete and unredacted answers, rather than serving redacted responses and  
 9 then supplementing later. Because this Court has not yet entered a protective order,  
 10 and Plaintiff agreed that SourceAmerica could supplement its responses upon entry  
 11 of a protective order, Bona Fide's motion to compel is premature, is a waste of the  
 12 Court's time and resources, and must be denied.

13 3. *Plaintiff's Motion Did Not Provide SourceAmerica with 28*  
 14 *days' Notice, as Required by the Local Rules*

15 Motions "require a minimum filing date of twenty-eight (28) days prior to the  
 16 date for which the matter is noticed." Local Civil Rule 7.1(e)(1). This motion was  
 17 noticed for April 17, 2017. Therefore, the motion must have been filed no later than  
 18 March 20, 2017. The motion was not filed until late evening on March 21, 2017.  
 19 Plaintiff did not apply for an order shortening time. Therefore, the motion is  
 20 untimely and should be denied.

21  
 22  
 23  
 24 <sup>5</sup> As that letter notes, both disqualified former counsel and Plaintiff have improperly  
 25 disclosed SourceAmerica's confidential attorney-client privileged information  
 26 publicly, and parties may refuse production until a protective order is entered. *See*  
 27 *Laine v. Wells Fargo Bank, N.A.*, No. C 13-04109 SI, 2014 U.S. Dist. LEXIS 124065,  
 28 \*5-8 (N.D. Cal. Sept. 4, 2014) (rejecting argument that a party must obtain a protective  
 order before the time to respond to discovery requests). However, despite various  
 meet and confer efforts regarding a protective order, the parties have not reached an  
 agreement. SourceAmerica and Bona Fide have filed cross motions for a protective  
 order pending before this Court.

**B. Bona Fide Failed to Establish That its Interrogatories and Requests for Production Seek Relevant Information**

Bona Fide's cursory discussion of nearly 70 discovery requests does not establish that the requests seek relevant information. Bona Fide has the burden to establish that the requests at issue seek relevant information and documents and Bona Fide's failure to meet that burden warrants denial of this motion. Fed. R. Civ. P. 26(b)(1); *Bryant v. Ochoa*, No. 07cv200 JM (PCL), 2009 U.S. Dist. LEXIS 42339, at \*3 (S.D. Cal. May 14, 2009). Bona Fide continuously misrepresents what the actual requests seek to rewrite them to appear more reasonably tailored to the needs of the case. For example, Bona Fide claims that RFP No. 11 seeks "documents or information related to SourceAmerica's role in the AbilityOne Program and its decisions regarding twelve Program opportunities alleged in Bona Fide's breach of contract claim and defenses to SourceAmerica's counterclaims." [Dkt. 378-1, 11:4-7.] It does nothing of the sort. Rather, RFP No. 11 seeks "All DOCUMENTS relating to ABILITYONE CONTRACT performance by any and all DEFENDANTS." It is not limited to twelve program opportunities, it is not limited by time, and it is not limited to SourceAmerica. The request's scope includes defendants that are no longer part of this case, contracts that have never been at issue, and periods of time that have nothing to do with any allegation in this matter. The request seeks information that is not relevant under any standard.

Similarly, Bona Fide claims that RFP No. 18 seeks "communications among SourceAmerica's agents, officers, or directors, and with the AbilityOne Commission, related to the Program and to the same twelve Program opportunities." [Dkt. 378-1, p. 11, lns. 10-12.] Again, it does nothing of the sort. In fact, RFP No. 18 seeks "All DOCUMENTS containing, compromising, or evidencing COMMUNICATION with John Murphy for the past 10 years." On its face, the request would encompass every written communication John Murphy has sent to or received from any person for an

entire decade. The request is not limited to communications between John Murphy and a specific person, communications regarding any of the facts at issue in this case, or even communications sent or received in a professional capacity. The request would include every text message John Murphy sent to his family, every spam email he received, and even any document that memorializes any conversation he had for an entire decade. The request seeks information that is patently not relevant.

Bona Fide similarly misrepresents many of its discovery requests in its motion to compel, as though the requests seek relevant information, when they actually seek an impossibly broad scope of documents or information that is not relevant to this case. Because Bona Fide has failed to establish that the requests seek relevant information, the Court should deny its motion to compel.

### **C. Bona Fide's Interrogatories and Requests for Production Are Overbroad and Burdensome**

Bona Fide argues that SourceAmerica has made no showing to establish that the requests are overbroad and burdensome. As an initial matter, it is unclear how Bona Fide expects a non-moving party to make a showing before it has filed its opposition. Further, SourceAmerica never had an opportunity to explain the specific basis of each of its objections, because Bona Fide failed to meet and confer.

Nonetheless, as discussed above with respect to relevance, many of the requests seek a staggering number of documents. Most requests are not limited by time in any way, and the few that are seek a decade's worth of documents. A request spanning back ten years is, at a minimum, of questionable relevance, as the parties entered into a settlement agreement on July 27, 2012 that released any claims that arose prior to that date. As such, the requests are overbroad as to time, and Bona Fide has never offered to limit the requests. (Nugent Decl. ¶20.)

Further, the requests also seek a shockingly large volume of documents that would take an enormous amount of resources to collect and produce. For example, in addition to the specific requests previously addressed, RFP Nos. 11 & 12 seek

documents relating to AbilityOne Contract performance and staffing by “any and all Defendants.” There are twelve defendants named in the First Amended Complaint, including the National Council of SourceAmerica Employers (“NCSE”). The NCSE is a membership network of approximately 350-400 non-profit agencies. (Declaration of Chris Wilkie in Support of Defendant SourceAmerica’s Opposition to Bona Fide’s Motion to Compel (“Wilkie Decl.”), ¶7.) To respond to the request, SourceAmerica would have to produce almost every document related to every AbilityOne contract. (*Id.*) This request would take months to respond to and would require SourceAmerica to collect over a million documents from seven field offices across the country. (*Id.*) SourceAmerica would also need to ask each field office to task someone with searching through all hard copy files. (*Id.*) Further, once the documents are collected, it would take months to determine which documents are responsive to the two requests. (*Id.*)<sup>6</sup> Similar to many of the other requests, the request is hopelessly overbroad on its face and burdensome in its application.

**D. Because Bona Fide Failed to Inform the Court Why Each of SourceAmerica’s Objection Are Not Justified, the Court Must Deny Bona Fide’s Motion to Compel**

Even if the Court finds that some of the requests seek relevant information, and are not overbroad and burdensome, SourceAmerica has made additional objections to each request setting out the legal grounds for why the requests are improper. Bona Fide’s choice to file a consolidated motion for nearly 70 discovery requests necessarily prevents SourceAmerica from undertaking a detailed individualized explanation of each objection to each request. On a motion to compel, the movant “bears the burden of informing the court of . . . (4) why defendants’

<sup>6</sup> Many of the other requests are similarly overbroad and burdensome. (Wilkie Decl. ¶¶5, 8-10.) Bona Fide’s belated offer noting that it “is willing to narrow its requests to reduce the burden and cost to SourceAmerica” is improper at this stage and should have been raised in a meet and confer effort. [Dkt. 378-1, p. 19, lns. 27-28.] Parties cannot purposefully craft broad requests in the hopes that a court will later rewrite the request and compel a response.

1 objections are not justified.” *Reece v. Sisto*, No. 2:10-cv-0203-JAM-EFB, 2017 U.S.  
 2 Dist. LEXIS 6403 at \*2 (E.D. Cal. Jan. 17, 2017); *Valenzuela v. City of Calexico*, No.  
 3 14-cv-381-BAS-PCL, 2015 U.S. Dist. LEXIS 26566 at \*1 (S.D. Cal. Mar. 4, 2015)  
 4 (stating “the moving party carries the burden of informing the court . . . the reasons  
 5 defendants’ objections are without merit”). If the moving party fails to explain why  
 6 the objections are not justified, a court cannot grant the motion to compel.  
 7 *Valenzuela*, 2015 U.S. Dist. LEXIS 26566 at \*1. Here, Bona Fide has made  
 8 conclusory statements regarding each of SourceAmerica’s objections, thereby failing  
 9 to specifically inform the Court why the objections lack merit. Therefore, Bona Fide  
 10 has failed to carry its burden, and the Court cannot grant its motion to compel.<sup>7</sup>

11 **E. Bona Fide’s Interrogatories and Requests for Production Seek**  
 12 **Information and Documents that are Confidential, Proprietary,**  
 13 **and/or Trade Secrets**

14 Bona Fide’s motion to compel inexplicably claims that SourceAmerica has  
 15 failed to “establish that responsive documents contain confidential information or  
 16 that disclosure would cause [SourceAmerica] harm.” [Dkt. 378-1, 23:7-8.]  
 17 However, less than two sentences later, Bona Fide then admits that these discovery  
 18 requests seek confidential, proprietary, and/or trade secret information. [*Id.* at lns.  
 19 12-13.] In fact, Bona Fide also requested that this Court enter a protective order with  
 20 respect to the information and documents sought by Bona Fide’s RFP Nos. 3-7, 24-  
 21 25, and 42 and Interrogatory Nos. 1-19. [Dkt. 360-1, Plaintiff’s Motion for  
 22 Protective Order, 4:25-26.]. Bona Fide’s claim that the requests do not require the  
 23 disclosure of confidential information is self-contradicting.

24 In addition, Bona Fide’s arguments lack merit. Bona Fide’s discovery requests  
 25 plainly seek protected confidential, proprietary, and/or trade secret information and

26 <sup>7</sup> However, even if the Court proceeds to the merits of each objection,  
 27 SourceAmerica’s objections are valid and should be sustained. In the event the Court  
 28 determines the meet and confer effort was sufficient, and finds that Bona Fide  
 established relevance in respect to its discovery requests, SourceAmerica would  
 welcome the opportunity to file a supplemental brief addressing each objection to each  
 request individually.

1 documents.<sup>8</sup> As SourceAmerica's Motion for Protective Order explains, Bona Fide's  
 2 discovery requests primarily seek information and documents from SourceAmerica's  
 3 administrative record for the approximately 18 AbilityOne Program opportunities at  
 4 issue in Bona Fide's amended and supplemental complaints. [Dkt. 358-1.] These  
 5 documents and information fit squarely within the statutory definition of "source  
 6 selection information" that SourceAmerica is legally obligated to protect from  
 7 improper disclosure, and which Bona Fide and Lopez are specifically prohibited by  
 8 law from directly receiving. Federal Acquisition Regulation § 2.101. Further,  
 9 because Bona Fide, Lopez, and their disqualified former counsel engaged in a pattern  
 10 of illegal and unethical conduct, SourceAmerica has sought a protective order that  
 11 allows the parties to designate documents and information as "Confidential AEO  
 12 Information" (i.e., Attorney Eyes Only). [Dkt. 358-1.]

13 SourceAmerica has also shown that disclosure of the protected documents  
 14 would cause substantial harm. [Dkt. 358-5, Declaration of Chris Wilkie in Support  
 15 of SourceAmerica's Motion for Protective Order.] If Bona Fide and Lopez were to  
 16 gain direct access to "source selection information" of other NPAs, then Bona Fide  
 17 and Lopez would have a significant and unfair advantage in responding to future  
 18 Opportunity Notices. [*Id.* at 6.] Further, if SourceAmerica permitted access by Bona  
 19 Fide and Lopez to other NPAs' Opportunity Notice responses and documents,  
 20 SourceAmerica would be in breach of its legal obligations and would rob NPAs of  
 21 their legitimate expectation of confidentiality. [*Id.* at 6-7.] In the future, such  
 22 disclosure could have a chilling effect that would discourage submission by NPAs of  
 23 certain proprietary information for the fear that it could be disclosed publicly and/or  
 24 to other NPAs. [*Id.* at 7.] Without the benefit of detailed proposals, the entire  
 25 AbilityOne Program would suffer because SourceAmerica would not have access to  
 26 the best information to make recommendations and evaluations. [*Id.*]

27  
 28 <sup>8</sup> As explained above, SourceAmerica has agreed to produce the information and documents that Bona Fide seeks, following entry of a protective order.

1 In sum, Bona Fide admits the discovery requests seek confidential, proprietary,  
 2 and/or trade secret information and documents. SourceAmerica has extensively  
 3 briefed the Court as to why the information and documents are confidential,  
 4 proprietary, and/or contain trade secrets in its Motion for Protective Order. [Dkt.  
 5 358-1.] Thus, disclosure of the information and documents to Bona Fide and Lopez  
 6 would result in substantial harm to SourceAmerica, NPAs, and the AbilityOne  
 7 Program. Because SourceAmerica has already agreed to produce the information  
 8 and documents following the entry of a protective order, which would protect the  
 9 confidential and proprietary information, this Court should deny Bona Fide's motion.

10 **F. Bona Fide's Interrogatories and Requests for Production Seek**  
 11 **Information and Documents Protected by Attorney-Client**  
 12 **Privilege and SourceAmerica's Decision Not to Produce a**  
 13 **Privilege Log Until the Entry of a Protective Order Does Not**  
 14 **Waive the Privilege**

15 In addition to the numerous issues with the requests discussed above, the  
 16 requests also blatantly seek information and documents protected by the attorney-  
 17 client privilege and/or the attorney work product doctrine. Bona Fide claims that  
 18 SourceAmerica must describe the withheld material to allow Bona Fide to assess the  
 19 objection, but the requests unambiguously seek privileged documents.<sup>9</sup> No privilege  
 20 log is required when the requests are so poorly crafted and so obviously seek  
 21 privileged documents. *Burlington N. & Santa Fe Ry. v. U.S. Dist. Ct.*, 408 F.3d  
 22 1142, 1149 (9th Cir. 2005); *Meyer v. Colavita*, No. SACV 11-00696-AG (MLGx),  
 23 2011 U.S. Dist. LEXIS 65091 at \*11-12 (C.D. Cal. June 17, 2011) (concluding that a  
 24 finding of waiver is inappropriate when the requested documents "constitute classic  
 25 work product" even when no privilege log was produced).

26 <sup>9</sup> The purpose of a privilege log is to allow the requesting party to evaluate the  
 27 applicability of the claimed privilege or protection. *Burlington N. & Santa Fe Ry.*, 408  
 28 F.3d at 1149; Fed. R. Civ. P. 26 (b)(5)(A)(ii). Therefore, when the claimed privilege is  
 applicable on its face, no privilege log is necessary to further the purpose of Federal  
 Rule of Civil Procedure 26.

1 For example, RFP No. 37 seeks “All DOCUMENTS relating to YOUR  
 2 settlement agreement in the case of SourceAmerica v. Jean Robinson, including, but  
 3 not limited to the final settlement agreement, drafts, and related correspondence.”  
 4 The request, on its face, seeks privileged documents. An attorney’s correspondence  
 5 related to a draft of a settlement agreement in a different matter would never be  
 6 subject to discovery in this case. There is no reason to force SourceAmerica to  
 7 produce a privilege log when all parties can assess the validity of the objection  
 8 looking solely at the request.<sup>10</sup>

9 Similarly, RFP No. 2 seeks “All DOCUMENTS relied on, consulted, or  
 10 reviewed by SourceAmerica in preparing its Responses to Plaintiff’s Interrogatories  
 11 in this matter.” Again, the request seeks privileged information on its face. There is  
 12 no possible response to the request that would not reveal what documents  
 13 SourceAmerica’s attorneys relied on, consulted, or reviewed in preparing discovery  
 14 responses. As the Supreme Court has explained, the attorney work-product doctrine  
 15 was created to protect an attorney’s evaluation and strategy about a case. *Hickman v.*  
 16 *Taylor*, 329 U.S. 495, 510-11 (1947). If this Court compelled SourceAmerica’s  
 17 attorneys to reveal what they considered in deciding how to respond to a request, it  
 18 would reveal the attorneys’ view of the case. *Dir., Office of Thrift Supervision v.*  
 19 *Vinson & Elkins, LLP*, 124 F.3d 1304, 1308 (D.C. Cir. 1997).

20 Bona Fide also argues that SourceAmerica has waived its asserted privileges  
 21 by not serving a privilege log with the responses. Bona Fide notes that the Ninth  
 22 Circuit requires courts to examine multiple factors “applied in the context of a  
 23 holistic reasonableness analysis” when determining whether a privilege is waived if a  
 24 privilege log is not produced. *Burlington N. & Santa Fe Ry. v. U.S. Dist. Ct.*, 408  
 25 F.3d 1142, 1149 (9th Cir. 2005). However, Bona Fide only discusses timing. [Dkt.

26  
 27 <sup>10</sup> A privilege log is also not necessary in response to this request because all  
 28 responsive documents would also have been created after June 19, 2014. As quoted  
 below, the parties have stipulated in their joint discovery plan that no privilege log is  
 necessary for documents created by legal counsel after that date.

378-1, 21-22.]]<sup>11</sup> As described in SourceAmerica’s motion for protective order, SourceAmerica has sought a stipulated protective order for months. [Dkt. 358-1.] SourceAmerica has not yet produced a privilege log in accordance with its agreement that the parties would not produce documents until the Court entered a protective order. (Nugent Decl. ¶¶ 12-15, 19.) Plaintiff fails to cite to any case, and SourceAmerica is aware of none, finding that a party waived its privilege objections by not producing a privilege log before the date that the parties agreed to produce documents and supplemental responses. Further, the parties’ joint discovery plan does not include any deadline for producing a privilege log. Bona Fide and Lopez have not provided SourceAmerica with a privilege log, a point conspicuously absent in its motion to compel, despite asserting privilege objections in their own responses to SourceAmerica’s requests for production. (Nugent Decl. ¶21)

The other factors considered by the Ninth Circuit when determining if a privilege is waived when a privilege log is not produced, such as the magnitude of the document production, weigh heavily in favor of SourceAmerica. Bona Fide’s requests are so broad that in some cases it is difficult to determine the universe of documents the request encompasses. As discussed above, some of the requests seek a decade of communications between third parties that SourceAmerica may not even be aware of, but would have to ask every single employee to search for to provide a response. As a practical matter, a party cannot create a privilege log until it can ascertain what documents are at issue. A finding of waiver in response to voluminous and vague discovery requests would create the exact danger that the

<sup>11</sup> In Bona Fide’s limited discussion of that single factor, Bona Fide ignores that SourceAmerica has not yet provided a privilege log because Bona Fide’s requests are manifestly overly broad, unduly burdensome and need to be narrowed to a reasonable scope before SourceAmerica can provide a response. Bona Fide’s own motion belatedly, and for the first time, offers “to narrow its requests to reduce the burden and cost to SourceAmerica,” yet such an offer was never made in any meet and confer effort. [Dkt. 378-1, p. 19, lns. 27-28.] Further, SourceAmerica’s delay in providing a privilege log is directly attributable to the delay caused by Bona Fide’s refusal to stipulate to a reasonable protective order. (Nugent Decl. ¶¶ 12-15, 19.)

1 Ninth Circuit warned of when crafting the waiver rule. *Burlington N. & Santa Fe Ry.*  
 2 *v. U.S. Dist. Ct.*, 408 F.3d 1142, 1149 n.3 (9th Cir. 2005).

3 In *Burlington Northern*, the Ninth Circuit noted that “we are aware (and take  
 4 this opportunity to make district courts aware) that litigants seeking discovery may  
 5 attempt to abuse the rule we announce today by propounding exhaustive and  
 6 simultaneous discovery requests”). *Id.* The Ninth Circuit recommended that a  
 7 responding party, faced with such a potential harm, should “either secure an  
 8 appropriate agreement or stipulation from the relevant litigants or, failing that, apply  
 9 for a discovery or protective order.” *Id.* SourceAmerica did exactly that.  
 10 SourceAmerica sought a protective order by filing its *Ex Parte* Motion to Disqualify  
 11 Plaintiff’s Counsel, (2) To Revoke PHV of Daniel J. Cragg’ (3) For Protective Order;  
 12 and (4) For Expedited Discovery. [Dkt. 251.]<sup>12</sup>

13 Finally, Bona Fide conspicuously fails to note that the parties’ Joint Discovery  
 14 Plan states no privilege log is necessary for documents created after June 19, 2014:

15 The parties agree that written communications between clients and their  
 16 respective counsel in this case created after June 19, 2014, need not be  
 17 identified on a Privilege Log. Similarly, the parties agree that  
 18 documents created by legal counsel for the parties after June 19, 2014,  
 19 on which a claim of attorney work-product protection is made, need not  
 20 be identified on a Privilege Log.

21 The parties intend to enter into a stipulation and protective order  
 22 regarding confidentiality of documents to be produced in this matter.  
 23 The Parties agree that privileged attorney-client communications  
 24 generated after the lawsuit filing date need not be included on a  
 25 privilege log. The Parties agree that protected work-product generated  
 26 after the lawsuit filing date need not be included on a privilege log.

27 (Joint Discovery Plan, pp. 29-30, Ins. 19-2.) Further, Bona Fide’s suggestion  
 28 that SourceAmerica has waived its asserted privileges in this case due to delay in  
 producing a privilege log smacks of hypocrisy. SourceAmerica asserted a timely

<sup>12</sup> The motion, as to the protective order, was denied without prejudice because the Court ruled that the motion should be first presented to the Magistrate Judge. After Bona Fide’s former counsel was disqualified, SourceAmerica sought to reach a stipulated protective order with Bona Fide’s current counsel. The parties were unable to reach an agreement and both parties filed motions for a protective order. [Dkt. 358 & 360.]

objection to each of the requests and has only delayed in serving a privilege log because of Bona Fide's consistent delay in stipulating to a protective order. Bona Fide has never requested that SourceAmerica serve a privilege log in advance of the entry of the protective order, despite numerous opportunities to do so. (Nugent Decl. ¶21) Bona Fide's own failure to produce a privilege log evidences the parties' joint agreement to engage in a simultaneous exchange of document productions and privilege logs following entry of a protective order. SourceAmerica has agreed to serve a privilege log following entry of a protective order and intends to do so.

**G. Magistrate Judge Bartick Already Ruled That SourceAmerica Sufficiently Responded to Bona Fide's Interrogatories, Set Two, and Requests for Production, Set Three**

Bona Fide's motion misconstrues the plain text of Magistrate Judge Bartick's order to avoid filing a motion for reconsideration. Bona Fide served Interrogatories, Set Two, and Requests for Production, Set Three, on July 13, 2016. The requests seek information and documents related to potential waivers of privilege made by SourceAmerica to the U.S. Attorney's Office in the Eastern District of Virginia. [Dkt. 331, p. 2, lns. 6-8.] Bona Fide then sought an order from Magistrate Judge Bartick seeking expedited discovery on the requests. [Dkt. 324.] However, SourceAmerica filed supplemental disclosures that, as Magistrate Judge Bartick noted in the Court's order, "set forth two tables explicitly identifying which portions of the Robinson Tapes had been produced, and which portions had been redacted prior to production." [Dkt. 331.] Therefore, the Court denied Bona Fide's request as moot. [*Id.*]

Magistrate Judge Bartick explicitly noted that, "The Court 'reviewed Defendant's Supplemental Disclosures and July 13, 2016 Letter to Plaintiff's counsel, and finds that Defendant has provided Plaintiff and the Court with sufficient information about the disclosures Defendant made to the U.S. Attorney's Office'."

1 [Id.]<sup>13</sup> In its limited meet and confer for these two sets of discovery, Bona Fide has  
 2 never clearly articulated what additional response it expects. (Goodman Decl. ¶7.)

3 Bona Fide now seeks to compel answers to requests that the Court already  
 4 determined were answered sufficiently. This approach is improper and disregards the  
 5 Court's previous order. Bona Fide's remedy was to file a motion for reconsideration,  
 6 not delay nearly a year and then file a motion to compel. Local Civil Rule 7.1(i).  
 7 Bona Fide's motion to compel disregards Magistrate Judge Bartick's previous  
 8 order.<sup>14</sup> Therefore, the motion is improper and this Court should deny the motion.

#### 9 **H. The Court Should Award SourceAmerica its Reasonable** 10 **Attorney's Fees**

11 Bona Fide's motion violates both the Federal Rules of Civil Procedure and the  
 12 Local Civil Rules. Bona Fide's motion to compel is not substantially justified as it is  
 13 procedurally defective, lacks merit, and seeks to compel responses that  
 14 SourceAmerica has already agreed to produce upon the entry of a protective order.  
 15 Even more egregiously, the motion also seeks to compel further responses to requests  
 16 that the Court has already ruled are moot and will not reconsider. The present motion  
 17 is a waste of judicial resources because both parties have agreed to produce  
 18 documents and information upon the entry of a protective order. Because Bona Fide  
 19 lacks substantial justification for its position, the Court must award the responding  
 20 party reasonable expenses, including attorney's fees. Fed. R. Civ. P. 37(a)(5)(B);  
 21 *see, e.g., Brandon v. D.R. Horton, Inc.*, No. 07cv1256 J (POR), 2008 U.S. Dist.  
 22 LEXIS 40000 at \* 6 (S.D. Cal. May 16, 2008) (affirming a magistrate judge's award  
 23 of attorney's fees to a defendant following successful opposition of a motion to

24  
 25 <sup>13</sup> Magistrate Judge Bartick also noted that "the information Plaintiff seeks about  
 26 Defendant's subsequent disclosures to the U.S. Attorney's Office is of questionable  
 27 relevance to the pending Objections." Bona Fide failed to establish that the subsequent  
 28 disclosures were relevant to the pending Objections then, and still fails to establish that  
 the subsequent disclosures are relevant to this case now.

<sup>14</sup> Further, when this case was reassigned to Magistrate Judge Schopler, this Court  
 explicitly stated that the reassignment "is not to be viewed as an opportunity to seek  
 reconsideration of previous adverse rulings." [Dkt 354, 3:1-2.]

compel). SourceAmerica's attorneys have incurred \$10,156.50 in attorney's fees in conjunction with the preparation of SourceAmerica's Opposition to the pending motion. (Nugent Decl. ¶23.)

**I. Bona Fide is Not Entitled to Recover Costs and Expenses, Including Attorney's Fees**

Alternatively, should the Court grant Bona Fide's motion, an award of costs and expenses is inappropriate. An award of fees is inappropriate when the moving party failed to meet and confer in good faith prior to filing a motion to compel. Fed. R. Civ. P. 37(a)(5)(A)(i); *Board of Trustees of Leland Stanford Junior Univ. v. Tyco Int'l Ltd.*, 253 F.R.D. 521, 523 (C.D. Cal. 2008) (denying award of fees because the moving party failed to meet and confer in good faith). As discussed above, Bona Fide failed to meet and confer as required prior to filing the present motion. (Nugent Decl., ¶20; Skrdla Decl., ¶5; Goodman Decl., ¶8.) Therefore, costs and expenses, including attorney's fees, incurred in bringing the present motion are not recoverable.

An award of costs and fees is also inappropriate when the respondent's position is substantially justified. Fed. R. Civ. P. 37(a)(5)(A)(ii). A position is substantially justified when reasonable people could differ on whether the respondent's position was appropriate. *Parsi v. Daiouleslam*, 778 F.3d 116, 126 (D.C. Cir. 2015); *Aevoe Corp. v. AE Tech Co., LTD.*, No. 2:12-cv-00053-GMN-NJK, 2013 U.S. Dist. LEXIS 135755 at \*7-11 (D. Nev. Sept. 20, 2013).

Here, SourceAmerica reasonably relied on repeated agreements to serve supplemental responses and produce responsive documents following entry of a protective order. SourceAmerica maintains that, in accordance with its agreement with Bona Fide, it will produce all protected confidential, proprietary, and/or trade secret information and documents upon the entry of a protective order. Moreover, SourceAmerica was substantially justified in declining to respond further to Bona Fide's Interrogatories (Set Two) and Requests for Production (Set Three) based on an order from this Court stating that no such response was necessary and this Court's

1 order stating that it would not reconsider previous adverse rulings. Because  
 2 SourceAmerica acted reasonably and with substantial justification, the Court should  
 3 not award Bona Fide its costs and expenses.

4 **IV. CONCLUSION**

5 In light of the foregoing, SourceAmerica respectfully requests that this Court  
 6 deny Plaintiff's Motion to Compel in its entirety and award SourceAmerica its  
 7 reasonable attorney's fees incurred in preparing its Opposition to Plaintiffs'  
 8 unnecessary, procedurally invalid, and frivolous motion.

9 Dated: April 3, 2017

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